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No. 92-1831

In the Supreme Court of the United States

OCTOBER TERM, 1993

NORTHERN KENTUCKY WELFARE RIGHTS ASSOCIATION AND MICHELLE ASBURY, PETITIONERS

v.

BRERETON C. JONES, GOVERNOR OF KENTUCKY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a private party may bring an action against state officials under 42 U.S.C. 1983 to enforce a provision in 42 U.S.C. 8624(b)(2)(B) that identifies eligibility criteria under the Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. 8621 *et seq*.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2605(b)(1)-(2) of the Low-Income Home Energy Assistance Act of 1981, as amended, 42 U.S.C. 8624(b)(1)-(2) (1988 & Supp. IV 1992), and 45 C.F.R. 96.50 are reprinted at App., *infra*, 1a-4a .

STATEMENT

1. The Low-Income Home Energy Assistance Program (LIHEAP or the program) is governed by the Low-Income Home Energy Assistance Act (LIHEAA or the Act), which was enacted as part of the Omnibus Budget Reconciliation Act of 1981. See Pub. L. No. 97-35, Tit. XXVI, 95 Stat. 893 (codified as amended at 42 U.S.C. 8621-8629). Under the program, the Secretary of Health and Human Services is authorized to make grants to States to assist eligible households to meet the costs of home energy. 42 U.S.C. 8621.

To receive funds under the program, a State must submit an application to the Secretary. 42 U.S.C. 8624(a)(1). States have broad discretion to determine how to distribute those funds. Among the permissible options are providing assistance payments to eligible households; making payments directly to suppliers of home energy (see 42 U.S.C. 8624(b)(7)); providing credits against state taxes for energy suppliers that supply home energy at reduced rates to low-income households (see 42 U.S.C. 8624(*l*)); and funding low-cost residential weatherization or other energy-related home repairs for low-income households (see 42 U.S.C. 8624(k)). A State wishing to receive program funds submits to the Secretary each year a plan describing the eligibility requirements and benefit levels to be used for each type of assistance it will provide for that year. 42 U.S.C. 8624(a)(1) and (c).

A State's discretion over the disbursement of program funds is not unlimited. Of the federal funds it receives, the State must reserve until March 15 of each program year "a reasonable amount based on data from prior years" for "energy crisis intervention." 42 U.S.C. 8623(c). Funds not set aside for the "crisis program" are used for the "subsidy program." In addition, 42 U.S.C. 8624(a)(1) requires a State to submit an annual application containing "assurances by the chief executive officer of the State that the State will meet

the conditions enumerated in" 42 U.S.C. 8624(b). Section 8624(b) in turn requires that officer to "certify that the State agrees to" comply with a number of program requirements. The penultimate sentence of Section 8624(b) provides, however, that "[t]he Secretary may not prescribe the manner in which the States will comply with the provisions of this subsection."

2. The Commonwealth of Kentucky participates in LIHEAP. The Commonwealth's 1990 plan permitted any household with an income less than 110% of the Kentucky poverty level to receive assistance from that portion of program funds devoted to the crisis program. With regard to the 1990 subsidy program, however, Kentucky restricted eligibility to low-income households that included an elderly or disabled member. Pet. App. A5-A6.

Petitioners initially brought this action in the United States District Court for the Western District of Kentucky, challenging Kentucky's implementation of LIHEAP for fiscal year 1990.[1] Petitioners alleged that the Commonwealth's restriction of the subsidy program to households containing an elderly or disabled individual violated a provision in 42 U.S.C. 8624(b)(2)(B) that requires the certification by the Governor to represent that the State will not "exclud[e] from eligibility under this subclause [dealing with eligibility for program assistance by reason of household income] for payments under this subchapter * * * [any] household [that] has an income which is less than 110 percent of the poverty level for such State for such fiscal year."[2] Pet. App. A7. The

[1] Petitioners' complaint named as defendants the Governor, the Secretary of the Cabinet for Human Resources, and the Commissioner of that Cabinet's Department of Social Insurance. Only the Governor appealed the district court's initial decision, and his successor is the only remaining respondent. See Pet. App. D2-D3; Pet. 2-3 n.1.

[2] Petitioners also contended that Kentucky's plan violated 42 U.S.C. 8624(b)(5), which requires the governor to certify that the State agrees to

district court entered an injunction in favor of petitioners, but the court of appeals held that the lower court had abused its discretion in denying respondent's motion for a change of venue, and remanded the case with instructions to transfer it to the Eastern District of Kentucky. *Id.* at D1-D23.

While the case was pending in the Eastern District, the court of appeals decided a similar case concerning Kentucky's LIHEAP participation for fiscal year 1991. *Cabinet for Human Resources* v. *Northern Kentucky Welfare Rights Ass'n*, 954 F.2d 1179 (6th Cir. 1992) (*reprinted at* Pet. App. C1-C44).[3] In that case, the court held that LIHEAA creates no private federal right of action (express or implied) to enforce its terms, at least prior to exhaustion of state administrative remedies (Pet. App. C17-C29); that the Act's comprehensive enforcement scheme forecloses recognition of any further remedy under 42 U.S.C. 1983 (Pet. App. C30-C31); and that the Act creates no federal rights enforceable under Section 1983 (Pet. App. C31-C44). On the basis of *Cabinet for Human Resources*, the district court in this case held that 42 U.S.C. 8624(b)(2) does not create a right enforceable under Section 1983. Pet. App. B1-B2.

The court of appeals affirmed. Pet. App. A1-A12. The court rejected petitioner's attempt to distinguish *Cabinet for Human Resources* as involving different provisions of the

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provide that "the highest level of assistance will be furnished to those households which have the lowest incomes and the highest energy costs in relation to income, taking into account family size." Pet. App. A6-A7. Petitioners do not renew that contention here.

[3] In *Cabinet for Human Resources*, the plaintiffs alleged that the 1991 Kentucky plan improperly used the amount of energy costs allowed public housing tenants in calculating income (cf. 42 U.S.C. 8624(f)(1)), failed to treat owners and renters equitably (see 42 U.S.C. 8624(b)(8)(B)), and did not afford the highest benefits to applicants with the lowest incomes and highest costs in relation to income (see 42 U.S.C. 8624(b)(5)). See Pet. App. A8, C13.

Act. Pet. App. A10-A11. It held that petitioners could challenge Kentucky's implementation of LIHEAP only through the State's own administrative process or by invoking the provisions of the statute that require the Secretary to investigate complaints and withhold funds from "any State which does not utilize its allotment substantially in accordance with the . . . assurances such State provided under Section 8624." *Id.* at A11-A12 (quoting 42 U.S.C. 8627(a)(1)).

DISCUSSION

1. At the outset, we note the possibility that this case is moot.[4] Petitioners' complaint sought a declaratory judgment that Kentucky's LIHEAP for fiscal year 1990 violated petitioners' federal statutory rights, and an order enjoining state officials from excluding petitioners from participation in the 1990 subsidy program and requiring them to comply with the assurances made by the State to the Secretary in connection with participation in the program for that year. Compl. 21-22. The complaint does not appear to seek relief regarding Kentucky's LIHEAP for any fiscal year other than 1990. Moreover, because it was brought against state officials in their official capacities, the suit may seek only prospective injunctive relief. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).

LIHEAP is annually funded, and once a State has expended its program funds for a particular fiscal year, even persons eligible for funding under a State's program will receive no

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[4] The court of appeals noted the possibility of mootness in its decision on the first appeal, Pet. App. D3-D4, but ultimately remanded on venue grounds without addressing the mootness issue. *Id.* at D23. On remand, neither the district court's brief order dismissing the case (*id.* at B1-B2) nor the court of appeals' decision affirming that disposition (*id.* at A1-A12) considered whether the case was moot. Neither party has addressed the issue in this Court.

funds. We have been informed by the Department of Health and Human Services that all funds available under the Kentucky LIHEAP for fiscal 1990 have been distributed. Moreover, the injunction initially entered by the District Court for the Western District of Kentucky in this case (see Pet. App. A2, D8-D9) was not vacated on venue grounds until May 24, 1991 (see *Northern Kentucky Welfare Rights Ass'n* v. *Wilkinson*, 933 F.2d 1009 (6th Cir. 1991) (Table) (noting judgment accompanying decision reprinted at Pet. App. D1-D23)), which was well after the expiration of fiscal year 1990 on September 30, 1990. It therefore appears that petitioners were in fact treated as eligible for participation in the Commonwealth's 1990 LIHEAP, all the funds from which have in any event already been distributed. Because the complaint sought nothing more, and because no further prospective relief could be ordered with respect to the 1990 program, the case would appear to be moot.

2. a. Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Petitioners' claim in this case is based on a law of the United States—a provision of the Low-Income Home Energy Assistance Act, 42 U.S.C. 8624(b)(2). Because "Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law," *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 106 (1989), it is necessary to determine whether LIHEAA "creates a 'federal right' that is enforceable under § 1983." *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990). The Court stated in *Wilder* that such an inquiry turns first on whether the particular statutory provision was intended to benefit the putative plaintiff. *Ibid.* If so, the provision will be held to create an enforceable right unless (i) it merely expresses a "congressional preference" for particular conduct, rather than imposing a binding obligation on the State, *Pennhurst State School & Hosp.* v. *Halderman*, 451

U.S. 1, 19 (1981), or (ii) the interest the plaintiff asserts is "too vague or amorphous" and therefore "beyond the competence of the judiciary to enforce," *Golden State*, 493 U.S. at 106 (quoting *Wright* v. *Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 423 (1987)). See *Wilder*, 496 U.S. at 509. Finally, no right will be held enforceable under Section 1983 if "Congress has foreclosed such enforcement," Pet. App. 508, either explicitly in the terms of the statute itself, or implicitly by providing a specific remedial scheme sufficiently compre-hensive to indicate an intention to preclude reliance on the more general mechanism of Section 1983. See 496 U.S. at 520-523.

Wilder upheld a suit by Medicaid providers under Section 1983 to enforce a provision of the Medicaid Act known as the Boren Amendment. See 496 U.S. at 524. A State desiring federal funding under that Act is required to submit for the Secretary's approval a plan describing the State's Medicaid program, and the Boren Amendment required that such a plan provide payment for medical services at rates

> which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws.

Id. at 503 (quoting 42 U.S.C. 1396a(a)(13)(A) (Supp. V 1987)).

In concluding that the Boren Amendment conferred on health care providers rights enforceable under Section 1983, the Court rejected the argument that the Amendment required no more than assurances made by the State to the Secretary, and that such assurances gave rise to no privately enforceable rights. Focusing on the statutory requirement that the State "fin[d]" its rates "reasonable and adequate" as a "necessary prerequisite" to making its assurances, the Court

held that "it would make little sense for Congress to require a State to make findings without requiring those findings to be correct." 496 U.S. at 512-515 & n.11. From an examination of the background and legislative history of the Boren Amendment, the Court concluded that Congress had intended to ensure substantive compliance by the States with the "reasonable and adequate" cost requirement, and rejected the argument that the requirement was too "vague and amorphous" to be judicially enforceable. *Id.* at 515-520. The Court emphasized that the statute and regulations "set out factors which a State must consider in adopting its rates," and provided "objective benchmark[s]" against which to measure the accuracy of a State's findings. *Id.* at 519-520 & n.17.

Finally, having found that the statute was intended to confer "enforceable rights" on Medicaid providers, the Court rejected the argument that the statute's own enforcement provisions were sufficient to preclude reliance on Section 1983. 496 U.S. at 520-523. The Court acknowledged the requirement that the State provide procedures for review of established rates, as well as the Secretary's ability to withhold approval of state plans or curtail payment of federal funds as sanctions for noncompliance with the Act. But the Court held that those state and federal administrative remedies "[could not] be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." *Id.* at 522.

b. In *Suter* v. *Artist M.*, 112 S. Ct. 1360 (1992), the Court held that there was no right of action under Section 1983 to enforce a provision of the Adoption Assistance and Child Welfare Act of 1980 (the Adoption Act), 42 U.S.C. 620-628, 670-679a. That Act, like the Medicaid Act, establishes a federal reimbursement program for certain services provided by the States, and requires that States wishing to participate in the reimbursement program submit for approval by the Secretary a plan containing various assurances, specified in the Act,

concerning the way in which the federal funds will be spent. 112 S. Ct. at 1363-1364. *Suter* involved the assurance required by 42 U.S.C. 671(a)(15) that the State's plan must

> provid[e] that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

See 112 S. Ct. at 1364.

Suter recognized that *Wilder* had involved both a facially similar statutory scheme (requiring submission of a state plan containing specified "assurances") and statutory language centering on "reasonable" action by the State. See 112 S. Ct. at 1367-1368. The Court emphasized, however, that in ascertaining the existence of federal rights enforceable under Section 1983, "each statute must be interpreted by its own terms," by "analyz[ing] the statutory provisions in detail, in light of the entire legislative enactment." *Id.* at 1367 & n.8. The Court framed the question as whether "Congress, in enacting the Adoption Act, unambiguously confer[red] upon the child beneficiaries of the act a right to enforce the requirement" of "reasonable efforts" reflected in the State's assurance to the Secretary. *Id.* at 1367.

In answering that question, the Court first "examine[d] exactly what is required of States by the Act." 112 S. Ct. at 1367. The Court remarked that the statute at issue in *Wilder*, and the accompanying regulations, "set forth in some detail the factors to be considered in determining the methods for calculating rates." *Id.* at 1368; see also *id.* at 1369 n.13 (discussing guidance furnished by implementing regulations in *Wright*). The Act at issue in *Suter*, by contrast, provided "[n]o further statutory guidance as to how 'reasonable efforts' are to be measured." *Id.* at 1368. The Court pointed out that the meaning of the "reasonable efforts" that must precede

placement of a child in foster care would "obviously vary with the circumstances of each individual case," and "[h]ow the State was to comply with this directive * * * was, within broad limits, left up to the State." *Ibid.* Moreover, the Secretary's regulations were "not specific" with respect to what constitutes "reasonable efforts," and "[did] not evidence a view that § 671(a) places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary." *Id.* at 1369. Similarly, the Court noted that while the legislative history of the Adoption Act showed that "Congress was concerned that the required reasonable efforts be made by the States," it "also indicated that the Act left a great deal of discretion to them." *Ibid.* & n.15.

Finally, the Court noted that the Secretary had authority under the Adoption Act to reduce or eliminate payments to a State as a result of any failure to comply with the Act or any "substantial" failure to comply with the State's own plan, and that in each case of an involuntary removal of a child from his or her home, the Act required a state judicial determination that the "reasonable efforts" requirement had been fulfilled. 112 S. Ct. at 1368. The Court did not decide whether those explicit remedies were sufficiently comprehensive "to manifest Congress' intent to foreclose remedies under § 1983"; but, the Court concluded, "they [did] show that the absence of a remedy to private plaintiffs under § 1983 [did] not make the reasonable efforts clause a dead letter." *Id.* at 1368-1369 & n.11; compare *Wilder*, 496 U.S. at 514.

On the basis of the foregoing indicia of congressional intent, the Court concluded that the "reasonable efforts" language in 42 U.S.C. 671(a)(15) did not "unambiguously confer an enforceable right upon the Act's beneficiaries." 112 S. Ct. at 1370. Rather, the term "reasonable efforts" in that context could be "at least as plausibly read to impose only a

rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary." *Ibid.*

3. The lower courts have discerned some tension between *Wilder* and its predecessors on the one hand, and *Suter* on the other. The courts have attempted to reconcile the cases and synthesize their approaches by supplementing the general analytical framework set out in *Wilder* and its predecessors with a particular focus, in the context of the entire legislative enactment, on the existence of the sort of specific, mandatory, and judicially enforceable statutory command to the States that this Court found wanting in *Suter*. See, *e.g.*, *Howe* v. *Ellenbecker*, 8 F.3d 1258, 1261-1263 & n.5 (8th Cir. 1993), cert. denied, 114 S. Ct. 1373 (1994); *Albiston* v. *Maine Comm'r of Human Servs.*, 7 F.3d 258, 261-264 (1st Cir. 1993); *Arkansas Medical Soc'y, Inc.* v. *Reynolds*, 6 F.3d 519, 524-528 (8th Cir. 1993); *Procopio* v. *Johnson*, 994 F.2d 325, 330-332 & n.9 (7th Cir. 1993); *Resident Council of Allen Parkway Village* v. *HUD*, 980 F.2d 1043, 1051-1053 (5th Cir.), cert. denied, 114 S. Ct. 75 (1993); *Stowell* v. *Ives*, 976 F.2d 65, 68-70 (1st Cir. 1992); *Clifton* v. *Schafer*, 969 F.2d 278, 283-285 (7th Cir. 1992). The court below recently adopted the same approach. *Horn* v. *Madison County Fiscal Court*, No. 92-6010 (Apr. 21, 1994), slip op. 4-9.

Following that approach, the courts of appeals have not reached conflicting results under LIHEAA or any similar statute since *Suter*, and further review of the decision below would therefore be premature. Moreover, LIHEAA has an unusual statutory and regulatory background that may suggest a Congressional intention to insulate participating States, in general, from enforcement other than through the federal administrative scheme. Thus, while it may at some point become necessary for the Court to provide further guidance in this area, we do not believe that course is called for now.

a. The brief decision below did not mention, let alone discuss, this Court's decision in *Suter*. It relied entirely on the Sixth Circuit's prior decision in *Cabinet for Human Resources*, Pet. App. C1-C44, which analyzed LIHEAA in some detail, but which was decided before *Suter*. Indeed, in its recent decision discussing the application of Section 1983 in light of *Wilder* and *Suter*, the court below did not even advert to its prior decision in this case. See *Horn* v. *Madison County Fiscal Court*, *supra*.

Petitioners are correct (Pet. 11-16) that the decision below and the Fourth Circuit's decision in *Hunt* v. *Robeson County*, 816 F.2d 150 (1987), conflict with the Eighth Circuit's decision in *Crawford* v. *Janklow*, 710 F.2d 1321 (1983), which held that a suit may be brought under Section 1983 based on an alleged violation of LIHEAA. But *Crawford*, like *Hunt*, also arose before *Suter*—indeed, before *Wilder* and *Golden State*. Thus, none of the conflicting decisions discusses the effect of this Court's most recent precedent.[5] The Eighth Circuit has applied *Suter* in considering whether two other federal statutes create rights enforceable under Section 1983 (see *Howe* v. *Ellenbecker*, *supra*; *Arkansas Medical Soc'y, Inc.* v. *Reynolds*, *supra*), but it has not had occasion to revisit its holding in *Crawford* in light of *Suter*. If and when it does, it

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[5] Petitioners contend (Pet. 13-14) that the decision below also conflicts with the Second Circuit's decision in *Rodriguez* v. *Cuomo*, 953 F.2d 33 (1992). That decision, which was also rendered prior to *Suter*, did not consider the threshold issue of the availability of a cause of action under Section 1983, and thus does not give rise to a true conflict on that issue. See *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984) (cases addressing merits without discussing jurisdiction do not resolve jurisdictional issue). Moreover, on the merits, *Rodriguez* considered and rejected a claim under 42 U.S.C. 8624(b)(2)(B) that is very similar to the one made by petitioners in this case. Thus, there is no conflict in ultimate result (*i.e.*, the denial of relief) between the decision below and *Rodriguez*.

may agree with the result reached in this case and in *Hunt*.[6] In any event, although this Court may eventually be required to clarify the relationship between *Wilder* and *Suter*, it would be premature to do so unless the courts of appeals reach conflicting results after full consideration of both cases in a particular statutory context.

b. As it comes to the Court, this case involves only the certification made by Kentucky to the Secretary under 42 U.S.C. 8624(b)(2)(B): that it would not "exclud[e] from eligibility under this subclause for payments under this subchapter * * * [any] household [that] has an income which is less than 110 percent of the poverty level for such State for such fiscal year." Under the general framework for evaluating the existence of a private right enforceable under Section 1983, we think it clear that in mandating such a certification, Congress intended to confer some concrete benefit on individuals like petitioners—potential LIHEAP

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[6] The plaintiffs in *Crawford* alleged that South Dakota's LIHEAP plan violated 42 U.S.C. 8624(b)(5), which requires the governor to certify that the State agrees to provide that "the highest level of assistance will be furnished to those households which have the lowest incomes and the highest energy costs in relation to income, taking into account family size." In light of the generality of that standard—as well as the text, background, and implementation of LIHEAA (see pages 16-19, *infra*)—*Suter* may well cause the Eighth Circuit to reexamine its conclusion in *Crawford* that a cause of action lies under Section 1983 to enforce 42 U.S.C. 8624(b)(5). It is also significant in this regard that *Crawford* did not address whether 42 U.S.C. 8624(b)(5) is "too vague and amorphous" to be enforced by a court. That standard was clearly articulated in *Wilder*, 496 U.S. at 509, and *Golden State*, 493 U.S. at 106, both of which were decided after *Crawford*. Compare *Horn* v. *Madison County Fiscal Court*, slip op. 6-7.

Although the Eighth Circuit rendered two decisions soon after *Crawford* in Section 1983 actions brought to enforce LIHEAA, neither addressed the existence of a cause of action under Section 1983, presumably because *Crawford* had so recently decided that issue. See *Clifford* v. *Janklow*, 733 F.2d 534 (1984); *Crawford* v. *Janklow*, 733 F.2d 741 (1984).

beneficiaries whose household income falls below the specified threshold. See *Wilder*, 496 U.S. at 509.

Nor does Section 8624(b)(2)(B) appear to come within either of the exceptions to recognition of an "enforceable right" under the *Wilder* framework. 496 U.S. at 509. Unlike the "general statement of 'findings'" that was held in *Pennhurst* to express only a "congressional preference" (451 U.S. at 19), 42 U.S.C. 8624(b) requires a participating State to "certify" that the State "agrees" to certain conditions on federal funding, including the eligibility criteria of Section 8624(b)(2)(B).[7] That certification is evidently meant to represent a "binding obligation" undertaken by the State. See *Wilder*, 496 U.S. at 509. Moreover, although there is room for dispute as to what exactly the State's certification obligates it to do—the issue on the merits in this case (see note 5, *supra*)—neither the relevant text of 42 U.S.C. 8624(b)(2)(B) nor the interest plaintiffs advance under that text is so "vague and amorphous" as to elude effective judicial resolution. See *Wilder*, 496 U.S. at 509. Unlike the "reasonable efforts" provision at issue in *Suter*, application of which would necessarily "vary with the circumstances of each individual case" (112 S. Ct. at 1368), the certification required under Section 8624(b)(2)(B) imposes a categorical limitation on the income eligibility criteria that a State may establish under LIHEAP. Whatever limitation that certification imposes, it imposes with respect to all applicants for benefits under a State's program (see 42 U.S.C. 8624(b)(8)(A); *Rodriguez* v. *Cuomo*, 953 F.2d at 36-39); and determining what it requires

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[7] The terms "certify" and "agrees" in Section 8624(b) are significantly more mandatory (or explicitly contractual) in import than the statutory language at issue in either *Wilder* or *Suter*. See *Wilder*, 496 U.S. at 503 (rates "the State finds, and makes assurances satisfactory to the Secretary, are reasonable"); *Suter*, 112 S. Ct. at 1364 (State "shall have a plan approved by the Secretary which * * * provides").

presents a routine interpretive question well within the competence of the courts.

The decision in *Suter* suggests that States participating in a federal grant program must have received fair notice of the possibility of private enforcement of program requirements intended for the benefit of private persons before the beneficiaries will be allowed to enforce them under Section 1983. See *Suter*, 112 S. Ct. at 1366-1367, 1369-1370; see also *Pennhurst*, 451 U.S. at 17. But any such "notice" requirement must, we think, be understood in light of the usual rule, reflected in this Court's prior cases, that federal rights that are stated in sufficiently specific and mandatory terms in the statute (perhaps as supplemented by implementing regulations) are subject to enforcement through Section 1983. See, *e.g.*, *Wilder*, 496 U.S. at 508-509 & n.9; *Wright*, 479 U.S. at 423-424; *Maine* v. *Thiboutot*, 448 U.S. 1, 4-8 (1980). Thus, a State participating in a federal program would ordinarily be expected to foresee that such requirements of a federal law, to which it has bound itself by participation in a federally funded program, may be subject to private enforcement under Section 1983—in the absence of a comprehensive enforcement scheme or other indicia of congressional intent to foreclose an action under Section 1983.

The certification required by 42 U.S.C. 8624(b)(2)(B), considered by itself, unambiguously commits any State applying for federal funds under LIHEAA to observe a substantive restriction on the limits it may set on income eligibility for program benefits. As noted above, there is room for dispute as to the exact content of that restriction. Except where a federal condition is "too vague and amorphous" to be enforced (see *Wilder*, 496 U.S. at 509), however, or where its application will necessarily "vary with the circumstances of each individual case" (*Suter*, 112 S. Ct. at 1368), disagreement about its meaning relates primarily to the merits of a

plaintiff's case, and does not provide the answer to the threshold question of the defendant's amenability to suit under Section 1983. In this case, Kentucky unquestionably undertook to comply with a specific, mandatory eligibility condition on the receipt and disbursement of federal funds. Under normal circumstances, the Commonwealth could not later claim surprise that putative beneficiaries of that condition who believed it had been violated would seek relief in an action under Section 1983.

The circumstances in this case are not, however, entirely normal. LIHEAA specifically provides that "[t]he Secretary may not prescribe the manner in which the States will comply with the provisions of" 42 U.S.C. 8624(b), which sets forth the certifications the State must make. 42 U.S.C. 8624(b) (concluding language following subsection (b)(14)). Moreover, in the legislative history of the 1981 amendments to LIHEAA and several other "block grant" programs, Congress made clear its purpose to "return basic control and responsibility [for the programs] to the State level." S. Rep. No. 139, 97th Cong., 1st Sess. 910-911 (1981). Thus, the Senate Report expressed the intent "that States be provided with the broadest possible latitude in the use of block grant funds and be free from all but the most minimal and necessary federal administrative and regulatory direction," and "specifically directed [the Secretary] not to interpret [the Act's] requirements by regulation[,] or otherwise go beyond the explicit boundaries of the limited federal role clearly defined in the [Act]." *Id.* at 908-909; see *Rodriguez* v. *Cuomo*, 953 F.2d at 38-39. Consistent with that legislative history, the Secretary's implementing regulations provide explicitly that under LIHEAP and six other block grant programs "the States are primarily responsible for interpreting the governing statutory provisions," and that "[i]n resolving any issue raised by a complaint or a Federal audit the [Secretary] will defer to a State's interpretation of its assurances and of

the provisions of the block grant statutes unless the interpretation is clearly erroneous." 45 C.F.R. 96.50(e) (reprinted at App., *infra*, 2a-4a).

The distinctive legislative history and regulatory implementation of LIHEAA therefore manifest a principle of deference to the States, and a corresponding absence of federal administrative guidance, to such a degree as to suggest that any doubts under the usual analysis in this area should be resolved against recognition of a right of action under Section 1983 to enforce the certification requirements in 42 U.S.C. 8624(b). At least that would appear to be so with respect to enforcement of those requirements (such as the one in 42 U.S.C. 8624(b)(5) that assistance must be furnished to households with the lowest income and highest energy needs in relation to income) that are stated in rather general terms and call for the exercise of judgment by the States in fashioning their programs. Cf. *Rodriguez* v. *Cuomo*, 953 F.2d at 38-39.[8]

c. LIHEAA prescribes a federal administrative scheme for its enforcement. First, the Act provides for federal compliance audits, by the Secretary or the Comptroller

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[8] Even in this context of deference to the States, however, the particular provision petitioners seek to enforce—which bars a State from excluding from eligibility households whose income is less than 110% of the State's poverty level, 42 U.S.C. 8624(b)(2)(B)—may be stated with sufficient specificity to be privately enforceable under Section 1983. Cf. *Rodriguez* v. *Cuomo*, 953 F.2d at 39 (declining to defer to State's interpretation of 42 U.S.C. 8624(b)(2)(B), compare *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), although subsequently agreeing with that interpretation). Nonetheless, we do not believe that the question whether that particular provision of LIHEAA is privately enforceable in an action under Section 1983 presents an issue of sufficient importance to warrant review by this Court. The only other appellate decision concerning that provision was the Second Circuit's decision in *Rodriguez*, which did not address the availability of an action under Section 1983 and which, moreover, denied relief on the merits. See note 5, *supra*.

General, of several States each year (and of any State whose program gives rise to a "pattern" of complaints), and it directs the Secretary to withhold funds from any State that does not use federal funds "substantially in accordance with the provisions of [LIHEAA] and the assurances such State provided under section 8624." 42 U.S.C. 8627(a) and (b). Under the regulations implementing LIHEAP and the six other block grant programs, the Secretary may also order a participating State to repay any amount not expended "in accordance with law o[r] the certifications provided by the State." 45 C.F.R. 96.51(a). LIHEAA requires the Secretary to respond initially within 60 days to any complaint "of a substantial or serious nature" that a State has failed to use program funds in accordance with the Act or its assurances under 42 U.S.C. 8624, and provides that a complaint that a State has violated an assurance is to be considered "serious" if the alleged violation "constitutes a disregard of such assurance." 42 U.S.C. 8627(a)(2). Such a complaint may be filed with the Secretary by any interested party, including potential beneficiaries such as petitioners. See Pet. App. A11-A12; compare *Wilder*, 496 U.S. at 522 (discussing regulatory scheme involved in *Wright*, 479 U.S. at 428). The regulations do not require a hearing on complaints (although the Secretary will conduct an investigation where appropriate, 45 C.F.R. 96.50(c)), and they do not provide for an administrative appeal when a complaint is rejected.[9]

LIHEAA's enforcement provisions may not be sufficiently comprehensive to demonstrate, by themselves, an affirmative congressional intention to foreclose additional remedies under Section 1983. See *Wilder*, 496 U.S. at 520-523; compare *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13-15, 20-21 (1981). But they do

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[9] The regulations do require a hearing before the Secretary may withhold or order repayment of program funds. 45 C.F.R. 96.51.

demonstrate that if LIHEAA's certification requirements are not enforceable in an action under Section 1983, they are not thereby rendered "dead letter[s]." *Suter*, 112 S. Ct. at 1368-1369. And together with 45 C.F.R. 96.50(e)'s regulatory assurance of federal deference in matters of statutory interpretation, as well as the legislative history's forceful articulation of a limited federal role in administering the program, the enforcement provisions can reasonably be understood as part of an overall statutory and regulatory framework that implies an absence of private enforcement under Section 1983. Compare *Suter*, 112 S. Ct. at 1368 (noting lack of regulatory guidance and that compliance with statutory directives was, "within broad limits, left up to the State").

d. In sum, while we disagree with some of the Sixth Circuit's reasoning in *Cabinet for Human Resources* and this case (see, *e.g.*, Pet. App. C43, determining that Congress was "suggesting instead of mandating" compliance with program requirements set out in 42 U.S.C. 8624), that court's conclusion that actions may not be brought under Section 1983 to enforce the certification requirements in 42 U.S.C. 8624(b) may well be correct, at least as a general matter. In our view, however, that conclusion depends heavily on the unusual statutory and regulatory setting described above. Because that setting is atypical—and because of the absence of a conflict among the circuits involving LIHEAA itself or an analogous statute—this case would not be an appropriate vehicle for further consideration by this Court of broader questions about the circumstances under which a cause of action will lie under Section 1983 to secure compliance with standards governing federally funded programs. Those broader questions do not in any event warrant review by the Court at this time, because the lower courts are in general agreement about the manner in which the teachings of *Wilder*

and *Suter* may be synthesized, and about the resulting framework for application of Section 1983.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] We note as well that a bill has been introduced in Congress to amend the Social Security Act to direct that in an action to enforce any provision of that Act, the provision "is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan." S. 1668, 103d Cong., 2d Sess. § 310(a) (1994). The proposed amendment further provides that it "is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in [*Suter*], but not applied in prior Supreme Court decisions respecting such enforceability." *Ibid.*

APPENDIX

1. Section 2605(b) of the Low-Income Home Energy Assistance Act of 1981, as amended, 42 U.S.C. 8624(b) (1988 & Supp. IV 1992), provides as follows:

> As part of the annual application required by subsection (a) of this section, the chief executive officer of each State shall certify that the State agrees to—
>
> * * * * *
>
> (2) make payments under this subchapter only with respect to—
>
> (A) households in which 1 or more individuals are receiving —
>
> (i) aid to families with dependent children under the State's plan approved under part A of title IV of the Social Security Act [42 U.S.C. 601 et seq.] (other than such aid in the form of foster care in accordance with section 408 of such Act) [42 U.S.C. 608];
>
> (ii) supplemental security income payments under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.];
>
> (iii) food stamps under the Food Stamp Act of 1977 [7 U.S.C. 2011 et seq.]; or
>
> (iv) payments under section 415, 521, 541 or 542 of title 38, or under section 306 of the

Veterans' and Survivors' Pension Improvement Act of 1978; or

(B) households with incomes which do not exceed the greater of—

(i) an amount equal to 150 percent of the poverty level for such State; or

(ii) an amount equal to 60 percent of the State median income;

except that no household may be excluded from eligibility under this subclause for payments under this subchapter for fiscal year 1986 and thereafter if the household has an income which is less than 110 percent of the poverty level for such State for such fiscal year[.]

2. 45 C.F.R. 96.50 provides in pertinent part as follows:

Complaints.

(a) This section applies to any complaint (other than a complaint alleging violation of the nondiscrimination provisions) that a State has failed to use its allotment under a block grant in accordance with the terms of the act establishing the block grant or the certifications and assurances made by the State pursuant to that act. The Secretary is not required to consider a complaint unless it is submitted as required by this section.

(b) Complaints with respect to the health block grants must be submitted in writing to either the Assistant Secretary for Health or: For the preventive health and health services block grant, the Director, Centers for Disease Control; for the alcohol and drug abuse and mental health services block grant, the Administrator, Alcohol,

Drug Abuse, and Mental Health Administration; for the maternal and child health services block grant, the Administrator, Health Resources and Services Administration. Complaints with respect to the social services block grant must be submitted in writing to the Assistant Secretary for Human Development Services. Complaints with respect to the low-income home energy assistance program and the community services block grant must be submitted in writing to the Director, Office of Community Services. (The address for the Director, Center[s] for Disease Control is 1600 Clifton Road, NE., Atlanta, Georgia 30333. For each of the other officials cited above the address is 200 Independence Avenue SW., Washington, DC 20201.) The complaint must identify the provisions of the act, assurance, or certification that was allegedly violated; must specify the basis for the violations it charges; and must include all relevant information known to the person submitting it.

(c) The Department shall promptly furnish a copy of any complaint to the affected State. Any comments received from the State within 60 days (or such longer period as may be agreed upon between the State and the Department) shall be considered by the Department in responding to the complaint. The Department will conduct an investigation of complaints where appropriate.

(d) The Department will provide a written response to complaints within 180 days after receipt. If a final resolution cannot be provided at that time, the response will state the reasons why additional time is necessary. Under the low-income home energy assistance program, within 60 days after receipt of complaints, the Department will provide a written response to the complainant, stating the actions that it has taken to date and the timetable for final resolution of the complaint.

(e) The Department recognizes that under the block grant programs the States are primarily responsible for

interpreting the governing statutory provisions. As a result, various States may reach different interpretations of the same statutory provisions. This circumstance is consistent with the intent of and statutory authority for the block grant programs. In resolving any issue raised by a complaint or a Federal audit the Department will defer to a State's interpretation of its assurances and of the provisions of the block grant statutes unless the interpretation is clearly erroneous. In any event, the Department will provide copies of complaints to the independent entity responsible for auditing the State's activities under the block grant program involved. Any determination by the Department that a State's interpretation is not clearly erroneous shall not preclude or otherwise prejudice the States auditors' consideration of the question.